SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 217

RALPH KOPELOVE AND RALPH SCHEAR,
Petitioners,

vs.

JOE SHERMAN, MAX ROBINSON AND S. H. ROBINSON & COMPANY, INC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

I.

Opinions of the Court Below.

The Opinion of the Supreme Court of Tennessee has been reported in the case styled *Joe Sherman* v. *Ralph Kopelove, et al.*, in 177 Southwestern (2) 19, Advance Sheets February, 1944, and will be reported in Vol. 180 of Tennessee Reports when published. The Opinion is in the record at page 155.

II.

Jurisdiction.

1. The jurisdiction of this Court is based upon U. S. C., Title 28, Section 344(b), Section 237 of the Judicial Code as amended.

2. The original date of the judgment of the Supreme Court to be reversed is January 8, 1944 (R. 155), petition for rehearing being filed January 18, 1944, within the time allowed therefor (R. 158), and petition for rehearing was denied March 4, 1944, and then became final (R. 178).

3. Petitioners jointly invoke Section 1 of the Fourteenth Amendment to the Constitution, that they were denied due process of law; and Petitioner Schear invokes Article 4, Section 1, of the Constitution of the United States, that the Chancery Court of Knox County and the Supreme Court of Tennessee denied full faith and credit to him under a judgment secured in the Court of Common Pleas of Montgomery County, Ohio, against Respondents Max Robinson and S. H. Robinson & Company, Inc.

III.

Statement of the Case.

The essential features of the case, with reference to procedure, are fully stated in accompanying petition for certiorari, which also contains a full statement of the questions presented, but some points will be elaborated upon herein.

IV.

Specification of Errors in Behalf of Ralph Kopelove.

The Supreme Court of Tennessee erred:

1. In affirming the Chancery Court of Knox County, Tennessee, and in not sustaining Assignment of Error Number 1 of Ralph Kopelove, to the effect that the Chancery Court of Knox County erred in rendering any judgment or decree against Respondent, under either the original bill, first and second amended bills, and the answer and cross-bill of Max Robinson and S. H. Robinson & Com-

pany, Inc., for the reason that no jurisdiction was obtained of Kopelove under either of them, by service of process, appearance by the defendant, or by publication of non-resident notices, for the following reasons appearing in the technical record, and as specified in the original Assignment of Errors:

(a) The making of Max Robinson a party defendant to the original bill by subpoena to answer and his subsequent appearance by answer and cross bill, did not give the Court jurisdiction of this defendant;

(b) The issuance and service of injunction under the original bill against Max Robinson and his appearance later by answer and cross bill, did not give the court jurisdiction of this defendant;

(c) The issuance of the attachment under the original bill and subsequent publication of non resident attachment notice for this defendant is void, because—

The attachment was not executed by the officer, the only return thereon, with the officer's signature, being "came to hand 7th day of Nov., 1942."

No attachment notice was ever served upon Max Robinson under the attachment issued.

The order for publication of non resident attachment notice on the Rule Docket was in error in reciting that an attachment was issued and levied on this defendant's property.

The non resident attachment notice as published does not say that there was an attachment issued and levied upon defendant's property, or the attachment executed by notice of garnishment upon anyone.

(d) All proceedings had under the first amended and supplemental bill are void, because—

No valid service of process was ever had as against defendant Ralph Schear, the attempt at service upon an attorney for him being unlawful and void.

Issuance and service of subpoena to answer upon S. H. Robinson & Co. did not result in the Court having jurisdiction of this defendant.

Issuance and service of injunction against Ralph Schear was void because not served upon him, service upon his so-called attorney being unlawful and void.

Issuance and service of the injunction against S. H. Robinson & Co. did not result in the Court obtaining jurisdiction of this defendant.

Service of injunction was never had against S. H. Robinson & Co., but only against S. H. Robinson, as shown by the Officer's return.

Issuance and service of attachment under the amended and supplemental bill did not result in the Court obtaining jurisdiction of this defendant, because such attachment was not properly served by service of garnishment notice upon S. H. Robinson, there being no service of garnishment notice on S. H. Robinson & Co.

No non resident publication was ever made in support of the attachment attempted to be served upon S. H. Robinson & Co.

(e) All proceedings had under the answer and cross bill and interpleader of Max Robinson and S. H. Robinson & Co. as to this defendant are void, because—

No subpoena to answer was ever lawfully served upon Ralph Schear, the attempted service thereof upon his attorney being void because he was a non resident of Tennessee.

No subpoena to answer was ever issued or served upon this defendant.

No non resident publication was ever attempted or had as to either Ralph Schear or this defendant.

The Court had no jurisdiction of the subject matter of the cross bill of interpleader, because there was no showing thereon that two or more persons were claiming adversely to each other the same debt or duty from Max Robinson and S. H. Robinson & Co., and the Robinsons were shown to have title, claim and interest to their own money and were in no danger of being held liable to both, Joe Sherman and Ralph Schear, and cross complainants showed a special liability to Ralph Schear and none to this defendant, and they were not indifferent as between the alleged claims.

By the answer and cross bill the Robinsons showed an indebtedness by negotiable note and their answer was conclusive and entitled them to a discharge in this cause.

(f) All proceedings had under the second amended and supplemental bill as to this defendant are void, because—

This defendant had not at that time been brought before the court under either the original bill, first amended and supplemental bill or the cross bill.

There was no fund impounded in the registry of the Court belonging to this defendant that could be attached by fiat of the Court or writ of attachment.

The jurisdiction of this defendant was not obtained because the fund in the registry of the Court was the property of Max Robinson and S. H. Robinson & Co., Inc.

No money recovery being sought against Ralph Schear, and the Court not having jurisdiction of him in any way, jurisdiction of this defendant could not be had by the attempted non resident publication.

The order for non resident publication was in error in reciting that an attachment had been issued and levied upon this defendant's property.

No attachment was ever issued or levied under the second amended and supplemental bill upon the property of this defendant.

The non resident attachment notice published thereunder does not say that any property of this defendant had been attached in any way.

2. In affirming the decree of the Chancery Court of Knox County, Tennessee, and in not sustaining assignment of error No. 3 which read:

> "The Court having no jurisdiction of the defendant, for the various reasons set forth in assignment of error number 1, the entry of a final decree and judgment against this defendant violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant of his liberty and property without due process of law."

V.

Specification of Errors in Behalf of Ralph Schear.

The Supreme Court of Tennessee erred:

1. In affirming the Chancery Court of Knox County, Tennessee, and in not sustaining assignment of error No. 1 of Ralph Schear, to the effect that the Chancery Court of Knox County erred in rendering any judgment or decree against Respondent, under either the original bill, first and second amended bills, and the answer and cross-bill of Max Robinson and S. H. Robinson & Company, Inc., for the reason that no jurisdiction was obtained of Schear under either of them, by service of process, appearance by the defendant, or by publication of non-resident notices, for the following reasons appearing in the technical record, and as specified in the original Assignment of Errors:

(a) The making of Max Robinson a party defendant to the original bill by subpoena to answer and his subse-

quent appearance by answer and cross bill, did not give the Court jurisdiction of Ralph Kopelove;

(b) The issuance and service of injunction under the original bill against Max Robinson and his appearance later by answer and cross bill, did not give the Court jurisdiction of Ralph Kopelove;

(c) The issuance of the attachment under the original bill and subsequent publication of non resident attachment notice for Ralph Kopelove is void, because——

The attachment was not executed by the officer, the return thereon, with the officer's signature, being "Came to hand 7th day of Nov., 1942."

No attachment notice was ever served upon Max Robinson under the attachment issued.

The order for publication of non resident attachment notice on the Rule Docket was in error in reciting that an attachment was issued and levied on Ralph Kopelove's property.

The non resident attachment notice as published does not say that there was an attachment issued and levied upon Ralph Kopelove's property, or the attachment executed by notice of garnishment upon anyone.

(d) All proceedings had under the first amended and supplemental bill are void, because—

No valid service of process was ever had as against defendant Ralph Schear, the attempt at service upon an attorney for him being unlawful and void.

Issuance and service of subpoena to answer upon S. H. Robinson & Co. did not result in the Court obtaining jurisdiction of Ralph Kopelove or this defendant.

Issuance and service of injunction against Ralph Schear was void because not served upon him, service upon his so-called attorney being unlawful and void.

Issuance and service of the injunction against S. H. Robinson & Co. did not result in the Court obtaining jurisdiction of Ralph Kopelove or this defendant.

Service of injunction was never had against S. H. Robinson & Co., but only against S. H. Robinson, as shown by the officer's return.

Issuance and service of attachment under the amended and supplemental bill did not result in the Court obtaining jurisdiction of Ralph Kopelove or this defendant, because such attachment was not properly served by service of garnishment notice upon S. H. Robinson, there being no service of garnishment notice on S. H. Robinson & Co.

No non resident publication was ever made in support of the attachment attempted to be served upon S. H. Robinson & Co.

(e) All proceedings had under the answer and cross bill and interpleader of Max Robinson and S. H. Robinson & Co. as to Ralph Kopelove and this defendant are void, because—

No subpoena to answer was ever lawfully served upon Ralph Schear, the attempted service thereof upon his attorney being void because he was a non resident of Tennessee.

No subpoena to answer was ever issued or served upon Ralph Kopelove.

No non resident publication was ever attempted or had as to either Ralph Kopelove or this defendant.

The Court had no jurisdiction of the subject matter of the cross bill and the bill of interpleader, because there was no showing thereon that two or more persons were claiming adversely to each other the same debt or duty from Max Robinson and S. H. Robinson & Co., and the said Robinsons were shown to have title, claim and interest to their own money and were in no danger of being held liable to

both Joe Sherman and Ralph Schear, and cross complainant showed a special liability to Ralph Schear and none to Ralph Kopelove, and they were not indifferent as between the alleged claims.

By the answer and cross bill the Robinsons showed an indebtedness by negotiable note and their answer was conclusive and entitled them to a discharge in the cause.

(f) All proceedings had under the second amended and supplemental bill as to Ralph Kopelove and this defendant are void, because—

Ralph Kopelove had not at that time been brought before the Court under either the original bill, first amended and supplemental bill or the cross bill.

There was no fund impounded in the registry of the Court belonging to Ralph Kopelove or this defendant that could be attached by fiat of the Court or writ of attachment.

The jurisdiction of this defendant was not obtained because the fund in the registry of the Court was the property of Max Robinson and S. H. Robinson & Co.

No money recovery being sought against this defendant, and the Court not having jurisdiction in any way, jurisdiction of this defendant could not be had by the attempted non resident publication.

The order for non resident publication was in error in reciting that an attachment had been issued and levied upon this defendant's property.

No attachment was ever issued or levied under the second amended and supplemental bill upon the property of this defendant.

The non resident attachment notice published thereunder does not say that any property of this defendant had been attached in any way.

2. In affirming the decree of the Chancery Court of Knox County, Tennessee, and in not sustaining assignment of error No. 4, which reads as follows:

> "The Court having no jurisdiction of this defendant or Ralph Kopelove for the various reasons set forth in Assignments of Error I and II, entry of final decree and judgment against this defendant violated his rights under Section 1, of the 14th Amendment to the Constitution of the United States, in that it deprived this defendant of his liberty and property without due process of law."

3. In not sustaining respondent's assignment No. 5 in that Court as follows:

> "The Court erred in adjudicating adversely to this defendant in any respect and particularly under the answer and cross bill of Max Robinson and S. H. Robinson & Co., because the judgment obtained by this defendant in the Court of Common Pleas of Montgomery County, Ohio, against Max Robinson and S. H. Robinson & Co. was *res adjudicata* of this defendant's rights as against them and Joe Sherman; and in addition, the Second Circuit Court of Knox County, Tennessee, had rendered judgment upon the aforesaid Ohio judgment in favor of this defendant against Max Robinson and S. H. Robinson & Co. on March 8, 1943, in case No. 11,136, and before the answer and cross bill of the Robinsons was filed and entry of such judgment was *res adjudicata* as against the Robinsons, as well as Joe Sherman."

4. In not sustaining respondent's assignment of error No. 6, reading as follows:

> "This defendant having procured a valid judgment in the Court of Common Pleas of Montgomery County, Ohio, against Max Robinson and S. H. Robinson & Co., upon the note at issue, such judgment was absolutely binding upon Max Robinson and S. H. Robinson & Co. and it was the duty of the Chancery Court to give full

faith and credit to the judicial proceedings of the State of Ohio, granting such judgment, and failure to do so violated Article 4, Section 1, of the Constitution of the United States."

5. In not sustaining respondent's assignment of error No. 9 before it, reading as follows:

> "The Court erred in sustaining the answer and cross bill of the Robinsons as a bill of interpleader and in adjudicating in any respect adversely as to this defendant and in holding that this defendant was not the true and lawful owner and holder of the note in question; and should have held that said note had been executed in the State of Ohio and in conformity with the laws of Ohio regulating negotiable instruments, and this defendant became the owner thereof by lawful negotiation."

VI.

Argument.

A. In the first place, it is insisted that every step of the process seeking to make respondents parties defendant did not conform to the Statutes of Tennessee regulating attachment and garnishment, issuance and service of process, and non-resident publication under attachment, and as the result respondents were denied due process of law, both being residents of Ohio, and that the Supreme Court of Tennessee has ignored previous decisions of both itself and of this Court protecting the rights of non-residents in attachment suits.

The Sections of the Code of Tennessee regulating attachment by garnishment are as follows:

> "Sec. 9428.—Where property, choses in action, or effects of the debtor are in the hands of third persons, or third persons are indebted to such debtor, the attachment may be by garnishment.
>
> "Sec. 9430.—Attachment by garnishment is effected by informing the debtor of the defendant, or person

holding the property of the defendant, that the property in his hands is attached, and by leaving with him a written notice that he is required to appear at the return term of the attachment, or before a justice of the peace, at a time and place fixed, to answer such questions as may be asked him touching the property and effects of the defendant.

"Sec. 9431.—The notice should also require the defendant not to pay any debt due by him, or thereafter to become due, and to retain possession of all property of the defendant, then or thereafter in his custody or under his control, to answer the garnishment.

"Sec. 9432.—A copy of the notice served upon the garnishee should be returned by the officer, with the attachment and levy, duly executed.

"Sec. 9446.—The garnishee shall not be made liable upon a debt due by negotiable or assignable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon, after he may have satisfied the judgment or decree."

To authorize an attachment by garnishment the plaintiff must have a debt or demand due at the commencement of the action to entitle him to subject the property of the defendant by attachment, Section 9396 of the Code of Tennessee granting such right as against non-residents and reads as follows:

"Sec. 9396.—Any person having a debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity, against the property of a debtor or defendant, in the following cases:

"(1) Where the debtor or defendant resides out of the state."

In *Railway Company* v. *Brooks*, 90 Tenn., 161, it was held that a verbal notice of garnishment under an execution is not sufficient, written notice being absolutely necessary.

In *Fire Insurance Company* v. *Ford & Cantrell, 164 Tenn., 107, 115*, it was held that a garnishment notice, served upon the Insurance Commissioner of Tennessee, was not good as against an Insurance Company, the Insurance Commissioner not being deemed the Insurance Company's Agent, and that voluntary appearance of the Insurance Company by answer could not operate to transfer the intangible rights of the defendants against the Insurance Company, garnishee, to the custody of the Chancery Court. There was no manucaption of the policy of fire insurance or the proceeds of the policy, hence neither passed from the principal defendant and the garnishee to the custody of the Court. Further, the voluntary appearance of the Insurance Company by answer could not operate to transfer the intangible right, alleged to exist in favor of Ford and Cantrell (the debtor defendants) against the Insurance Company to the custody of the Court, this being so in Tennessee because the Insurance Company did not in its answer admit liability.

When the answer of a garnishee denies liability no judgment can be rendered against the Insurance Company as a garnishee.

Ford & Cantrell, Supra; Groveland Bank Co. v. *Bank*, 144 Tenn., 542; *Sentinel Fire Ins. Co.* v. *Nall*, 166 Tenn., 647.

The garnishment of the maker of a negotiable or assignable paper is ineffective unless the paper is delivered or the garnishee completely exonerated and indemnified of all liability thereof.

Sentinel Fire Ins. Co. v. *Nall, Supra*, p. 650; *Matheny* v. *Hughes*, 57 Tenn., 401; *Kimbrough* v. *Hornsby*, 113 Tenn., 605.

Gibson's Suits in Chancery is the Bible of equity pleading and practice in Tennessee. Section 877 of this excellent work outlines the steps to be taken to bring a defendant into court under an attachment bill; that where no subpoena is served upon a defendant he must be brought before court by levy of attachment upon his property and publication duly made; and that as soon as writ of attachment is returned with levy indorsed thereon the Clerk will enter on the Rule Docket an order of publication, in accordance with the form given at page 712 of Gibson's Suits in Chancery, and in a note to this Section the Author says:

> "Great care should be taken to have the order of publication, and the publication itself, in strict conformance with the statute; for, if the publication omit any essential, the whole proceeding founded upon it is an utter nullity. Bains v. Perry, 1 Lea, 37. The essentials of the published notice are: 1. The names of the parties to the suit; 2. The style of the Court to which the attachment is made returnable; 3. The Cause alleged for suing out the attachment; 4. The fact that the attachment has been levied on the defendant's property; 5. The time and place at which the defendant is required to appear, and defend the suit; and 6. The name of the Clerk & Master of the Court testing the notice. Code section 9473; Riley v. Nichols, 1 Heisk. 19; Bains v. Perry, 1 Lea 37. The order for publication need not be as precise as the published notice. Allen v. Gilliland, 6 Lea 531."

Sections 9469-9475 of the Code of Tennessee regulate procedure in attachment cases and Section 9473 provides, as to what the notice of levy to be published shall contain:

> "This memorandum or notice shall contain the names of the parties, the style of the court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which defendant is required to appear and defend the *attachment suit.*"

It has been held by the Supreme Court of Tennessee that a publication notice is undoubtedly defective where it fails to show that an attachment has been issued or that it had been levied, or the cause for which it had been issued.

Riley v. *Nichols,* 1 Heisk. (48 Tenn.) 16;
Bains v. *Perry,* 1 Lea (69 Tenn.) 37;
Howard v. *Jenkins,* 5 Lea (73 Tenn.) 176;
Holland v. *Railroad Co.,* 16 Lea (84 Tenn.) 414.

Without both levy and publication in due form, a judicial attachment will not support a judgment, unless the defendant appear.

Ingle v. *McCurry,* 48 Tenn., 26.

A decree rendered without these prerequisites is void.
Bain v. *Perry,* 1 Lea, 38-39;
Walker v. *Cottrell,* 65 Tenn., 256-273.

The record at pages 8-9 shows that there was no service of the original attachment under the original bill. Likewise, the non-resident attachment notice at page 9 does not state the cause alleged for suing out the attachment, and the fact that the attachment had been levied upon the defendant's property.

After the filing of the first amended and supplemental bill, the record shows that the attachment was not executed upon S. H. Robinson & Company, Inc., nor upon anyone, as the officer did not sign the return. There is a line stating that the attachment was executed as commanded by serving garnishment upon S. H. Robinson. However, there is no writ of garnishment attached to and made a part of the attachment or the return thereon (R. 19-20).

Under the answer and cross-bill and interpleader of the Robinsons, process was not issued for Ralph Kopelove and the only attempt to serve process was upon the attorney for Ralph Schear, there being no order of Court directing

that this be done (R. 29). This is, likewise, true of the injunction served upon Schear's attorney (R. 30-31). There was no process issued, let alone served, upon Ralph Kopelove or Joe Sherman upon the interpleader.

Following the filing of the second amended and supplemental bill the non-resident attachment notice does not show that it was executed upon any property of either Ralph Schear or Ralph Kopelove (R. 43-44). No process was issued under this proceeding.

It is submitted, therefore, that there was never any service of garnishment writ upon the Robinsons and that none of the publication notices stated that property of Ralph Schear or Ralph Kopelove was impounded under any alleged attachment.

B. The Supreme Court of Tennessee erred in holding that the attempted service of process under the second amended bill, with injunction, and under the interpleader, was effective as to either respondent. The Opinion of the Court in the last paragraph says that both the defendants employed an attorney in Tennessee, whereas the attorney of record in the Circuit Court case for Ralph Schear was not then the attorney of Ralph Kopelove and was never served with such process as the attorney of Kopelove. No process was ever issued for Kopelove and served upon his attorney. Such substituted service of process has been heretofore condemned by the Supreme Court of Tennessee and in *Thach* v. *Continental Travelers' Mutual Accident Association,* 114 Tenn. 271, an attorney for an Insurance Company was held not to be an agent upon whom service of process in a suit against the Company could be made and the Court did not acquire jurisdiction by such service.

The Supreme Court of Tennessee has approved a method of service upon a non-resident, through his resident attorney, where a resident defendant is sued by a non-resident

and the resident defendant files a cross-bill against a non-resident. In *Essenkay* v. *Essenkay Sales Company,* 132 Tenn. 287, a suit in Chancery Court, the complainants were non-residents, and the defendant asked the Court that service of process under the cross-bill be made upon the solicitor of record for the complainants. The Chancellor refused to make the order and the Supreme Court held the Court was in error. There must be an application specifically served upon the attorney for the non-resident complainant. The rule approved in the above Essenkay case, in commenting upon an English case, is as follows:

> "It is further stated in the text, however, that substituted service of a copy of the cross-bill upon the solicitor who filed the original bill will not be ordered, but that the court will in such a case stay the proceedings in the original cause until the defendants have entered an appearance. But in a note it is shown that the American rule is different, that substituted service is permitted in the United States courts in *cross-causes,* and *injunction bills to stay proceedings at law* in the *same court*—citing *Hitner* v. *Suckley,* 2 Wash. C. C. 465, Fed. Cas. No. 6543; *Ward* v. *Seabring,* 4 Wash. C. C. 472, Fed. Cas. No. 17160; *Dunn* v. *Clarke,* 8 Pet. 1, 8 L. Ed. 845; *Schenck* v. *Peay,* 1 Woolworth 175, Fed. Cas. No. 12450."

The Court held further that an order of court must be made allowing the substituted service as a preliminary thereto, and said order or copy thereof must be served with the process and copy of the bill and it must be stated in the order that it is to be so served.

There was no order in the cause below that service of process under the first amended bill and the interpleader should be made upon the attorney for Ralph Schear. Before the service was made, as shown by the return, and which service was made at the request of the complainant's solicitor, Petitioner Schear had already secured a

final judgment in the Circuit Court against the Robinsons, such judgment being entered March 8, 1944. (See Certified copy of Judgment, R. 35-36.)

C. Service of injunction under the amended bill and interpleader, on the attorney for Schear, was void and ineffective.

In *Hutsell* v. *Harrington,* 157 Tenn. 553, 557, the Supreme Court of Tennessee held that to be bound by an injunction it must be served upon a party or he must have actual knowledge thereof.

Gibson's Suits in Chancery, Section 825, considering cases *not* proper for injunctive relief, says: "The Chancery Court would not grant an injunction against a non-resident upon whom personal process has not been served," citing *1 High on Injunctions, Section 33.*

See *32 Corpus Juris, "Injunctions," Section 69, page 83,* where the text writer points out that an injunction operates *in personam* and would not issue against one not within the jurisdiction of the court.

See *Howell* v. *Thompson,* 130 Tenn. 310, 323-324, where the Supreme Court of Tennessee said:

> "If the court is without jurisdiction of the subject matter of the case in which it is attempted to proceed, its orders are void. An injunction made in respect to a subject matter beyond the jurisdiction of the court is a mere nullity and binding on no one. It may be disregarded. *State* v. *Ragghianti,* 129 Tenn. 560, 167 S. W. 689."

Supporting the foregoing points in part are the following Tennessee cases:

Edwards v. *New York Life Ins. Co.,* 173 Tenn. 102;
Purnell v. *Morton Live Stock Co.,* 156 Tenn. 383;
Commerce Union Bank v. *Scharber,* 20 Tenn. App. 451.

See *Kerr* v. *White*, 66 Tenn. 394, where it was held that a restraining order, to be effective against a party, that party must be subject to the Court's jurisdiction, and a party to the cause.

D. By Section 8962 of the Code of Tennessee the answer of a garnishee is not conclusive, where the sum in controversy is less than $1000.00. It has been held that where the amount is over $1000.00, the garnishee could have made conclusive answer and have been discharged.

See *Mahan Motor Company* v. *Lyle*, 167 Tenn. 193, where it was held, to warrant a judgment against a garnishee, the liability must clearly appear and the doubt must be resolved in favor of the garnishee. In addition to *Fire Insurance Company* v. *Ford and Cantrell* and *Insurance Company v. Nall, supra,* in support of the principle that the maker of a note cannot be held, unless the note is surrendered, see *Pickler* v. *Rainey*, 44 Tenn. 335; *Hughes* v. *Powers*, 99 Tenn. 480. Likewise, see *Groveland National Bank* v. *City National Bank*, 144 Tenn. 520, where Knoxville creditors of a non-resident sued him by attachment in Chancery, and attempted to attach a carload of beans. There being complications about the attachment of the beans in possession of a railroad, an amended and supplemental bill was filed making the City National Bank a party defendant to reach the proceeds of a draft, to which a bill of lading for the carload of beans was attached, as the property of the non-resident defendant. The Bank answered, admitting that the draft had been drawn and came through it and expressing its readiness to pay the money to the parties and obey the orders of the Court; the Court ordered the money paid to a receiver and later pro confesso was taken and final decree entered and the funds disbursed. The Groveland National Bank later sued the City National Bank for the proceeds of the draft, claim-

ing it was not a party to the suit and was the owner of the draft and the Bank defended with the theory that the Banking company had actual notice of the suit and did not intervene. The Supreme Court of Tennessee, however, gave judgment against the City National Bank and stated in part at page 542:

> "The argument in support of the defendant's contention is that an innocent garnishee may be wrongfully compelled to account for property in his hands twice. This contention overlooks the fact that the garnishee is in a perfect situation to protect himself. If he conceives himself to be in a situation of that sort, he can easily protect himself by having brought into court all persons interested in the fund. He can usually protect himself by his answer. To authorize a judgment against the garnishee, his indebtedness must clearly appear in so many words or from admitted facts which show his liability as a legal consequence. If the answer does not contain admissions sufficient to charge him, the garnishee must be discharged. For instance, if the garnishee answer that he does not know whether he is indebted or not, or if his answer is not sufficiently specific he must be discharged. See authorities cited in note 3, section 4831, Shannon's Code.
>
> "In this case if the defendant had answered setting up the facts which were within its knowledge, no judgment could have been rendered against it; that is to say, if the bank had shown in its answer to the court that this draft was made payable to the Groveland Banking Company, from whom defendant received it and to whom it was to account, and that it did not know whether the banking company was the owner of the draft or whether it belonged to the drawers thereof, no judgment could have been pronounced on such an answer or, *if such judgment should by error be pronounced,* the Groveland Banking Company could have been brought into court and required to set up its rights, if any it had, and in this way the defendant bank could

have been afforded ample protection against the payment of the money twice."

Likewise, to the same effect is *Hurst-Boillin Company* v. *Kelly,* 146 Tenn. 251. In that case the non-resident defendant filed a plea in abatement, denying that the draft in the bank belonged to him, and the Court held that the proceeds of a draft passing through a resident bank from a non-resident did not subject the non-resident owner of the draft to garnishment in an action in Tennessee against the depositor of the draft in a Kentucky Bank. The Court not only found that the draft was a negotiable instrument but the proceeds belonged to the Bank of Lexington, Kentucky; and that, under the plea of Kelly to the jurisdiction of the court, "if the fund did not belong to Kelly, then the Court had no jurisdiction, and jurisdiction can always be raised by plea in abatement."

The Supreme Court of Tennessee, has heretofore held in *Carroll* v. *Parkes,* 60 Tenn. 269, that a garnishee has a clear remedy at law to protect himself against an erroneous judgment in favor of the garnishor, or an action at law by a third party to recover the same fund. In that case the garnishee was sued in two justice of the peace suits, and judgment went down; and when he was sued again as garnishee he attempted to interplead the garnishor in Chancery and the Supreme Court held he could have successfully defended the judgment against him and he had no right to have the matter determined under interpleader in Chancery Court.

To the same effect is *Henegar v. Brannon,* 137 Southwestern (2d) 889, where the right to interplead was denied, even though money was paid into court.

See also *Bank of Whitehouse* v. *Baldridge,* 134 Tennessee 7, where the Bank of Whitehouse was denied the right to interplead because three classes of creditors were

making claim against the Bank, their claims not being against the same thing and the Bank could not force different types of creditors to interplead.

Joe Sherman was proceeding against the Robinsons as garnishor, and the Robinsons could have answered as garnishees and have been discharged. Sherman was not making the same claim against the Robinsons as Schear was making against the Robinsons. Sherman proceeded against them as garnishees, Kopelove being the principal defendant. Interpleader, therefore, did not lie because the same claim was not being made by Sherman, Kopelove and Schear.

See also *Newsom* v. *Interstate Rd. Company,* 153 Tenn. 202.

E. The judgment of Schear against the Robinsons in Ohio was *res adjudicata* as to them, being upon a negotiable note, with a provision for a confessed judgment. The transcript of the judgment from Ohio was sued upon in Circuit Court of Knox County, Tennessee, and judgment was obtained before the interpleader was filed. The Negotiable Instrument Act is a part of the law of Ohio (General Code of Ohio, Section 8110, et seq.) Section 8110 defines a negotiable instrument and permits a provision for a confession of judgment, if the instrument be not paid at maturity. Cognovit notes are valid in Ohio and have been approved for one hundred years.

Osborne v. *Rawley,* 190 Ohio 130;

McClure v. *Bowles,* 5 Ohio Nisi Prius, 327; 5 Ohio D. 288;

Sloo v. *Lea,* 18 Ohio, 279;

Swisher v. *Orrison Cigar Co.,* 122 Ohio State 195, 171 N. E. 92.

The General Code of Ohio expressly recognizes the power of courts to render judgment of confession upon warrants of attorney. (See Ohio Jurisprudence, Vol. 29, page 890).

F. The last amended bill did not seek a recovery against Schear, but prayed that he be made a party defendant by non-resident publication. The publication made was based upon a judicial attachment directed by the Court to be made. (See Fiat, R. 43). No attachment was ever issued as result of this fiat, and the non-resident publication notice wholly failed to say that an attachment had been ordered or made, or executed, the publication notice being wholly silent as to why it was being made and failing to say that any *res* of the defendants had been attached. (See Publication, R. 43-44).

The fund in court was not the property of either Kopelove or Shear but was the property of the Robinsons, improperly deposited in court when they were not made garnishee defendants, and under their abortive answer and interpleader. As pointed out heretofore, no process was ever served under this interpleader except that attempted to be made upon Schear. Kopelove was never before the court up to the time the last amended bill was filed. For the Court to have jurisdiction of him under this last amended bill, there must have been an attachment of *his* property, with proper non-resident publication advising him that his property was attached.

G. Former Opinions of the Supreme Court of Tennessee following *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565:

The Supreme Court of Tennessee has heretofore consistently followed this Court that jurisdiction of a non-resident cannot be obtained except by due process and that such due process requires a tracking of the Statutes of the State regulating attachment by garnishment:

Rose v. *Rose*, 176 Tenn. 680;
Edwards v. *N. Y. Life Ins. Co.*, 173 Tenn. 103, 107;
Dickson v. *Simpson*, 172 Tenn. 680, 687;
Knox Bros. v. *Wagner*, 141 Tenn. 354;

Southern Ry. Co. v. *Williams,* 141 Tenn. 46, 51;
Perry v. *Young,* 133 Tenn. 522, 536, 546;
Anderson-Tally Co. v. *Thompson,* 132 Tenn. 80, 87;
Knaffl v. *Golden Cross,* 121 Tenn. 212, 226;
Paper Co. v. *Shyer,* 108 Tenn. 444, 450;
Fitzsimmons v. *Johnson,* 90 Tenn. 416, 424;
Taylor, et ux. v. *Rountree,* 83 Tenn. 725, 727;
Lawson v. *Laundry Machinery Co.,* 165 Tenn. 180.

In the last case the Supreme Court of Tennessee said in part:

> "It is, however, recognized by all courts that a personal judgment may not be rendered against a non-resident defendant, of whom jurisdiction is acquired only by notice by publication. Perry v. Young, 133 Tenn. 522, 182 S. W. 577; Paper Company v. Shyer, 108 Tenn. 444, 67 S. W. 856, 58 L. R. A. 173; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100.
>
> * * * * * * *
>
> A cross-bill is an auxiliary suit, a dependency of the original litigation, and the dismissal of the original bill by the complainant may carry with it the cross-bill, or an answer filed as a cross-bill. Gibson's Suits in Chancery (Chambliss edition), section 726. In Moore v. Tillman, 106 Tenn. 361, 365, it was held that an answer filed as a cross-bill, upon which no cost bond was made nor process served, and which had not been replied to, went out of court with the complainant's voluntary dismissal of the original bill. But it has been ruled that a cross-bill, or an answer filed as a cross-bill, which has been replied to and on which proof has been taken, will not fall with the dismissal of the original bill, and may be prosecuted to judgment. Nichol v. Nichol, 63 Tenn. (4 Baxter) 145, 158; Partee v. Goldberg, 101 Tenn. 664; McDowell v. Hunt Contracting Co., 133 Tenn. 437."

II. The Opinions of this Court as to due process of law:

Pennoyer v. *Neff*, *Supra*, has long guided this Court in regulating jurisdiction of courts over non-residents. The principle is further illustrated in numerous other cases.

See *Cooper* v. *Reynolds*, 77 U. S. 308, 19 L. Ed. 931, where it was held that to obtain jurisdiction of a non-resident there must be service of process upon him, or his voluntary appearance, or seizure of the *res* belonging to him, under process of court.

In *Chicago, &c., Company* v. *Sturm*, 174 U. S. 710, 43 L. Ed. 1144, this principle was developed further, one feature being that where there is an attachment by garnishment due process requires that the laws be ample and be followed in bringing the garnishee before the Court.

In *Harris* v. *Balk*, 198 U. S. 215, 49 L. Ed. 1023, due process by attachment and garnishment was prescribed by the laws of Maryland and this Court held that the procedure was followed in a garnishment of a non-resident creditor within the State and jurisdiction, therefore, obtained of him.

See *Baker* v. *Baker*, 242 U. S. 394, 61 L. Ed. 386, where there was administration of the estate of Baker in Tennessee by his widow and the widow thereafter filed suit in Chancery Court of Hardin County, Tennessee, against the mother of the deceased, a resident of Kentucky, in which the Court adjudicated that the widow was the owner of the shares of stock in a Kentucky corporation, although the shares of stock were not seized. The widow sued upon this final decree in Kentucky, and this Court, when the case reached it, held that jurisdiction of the Kentucky mother was not obtained in the Tennessee proceeding, and that the facts surrounding jurisdiction could be inquired into when the suit was brought in Kentucky; and as a result of the failure of the Chancery Court of Hardin County, Tennessee, to acquire jurisdiction of the mother or the corporation issu-

ing the shares of stock, the Tennessee decree was not entitled to full faith and credit under Article 4, Section 1 of the Constitution of the United States. Featuring that case was the failure to seize the shares of stock. Also, mere knowledge on the part of the non-resident of the pendency of the suit in Tennessee did not estop the defendant to contest the result there, if he did not choose to submit himself to jurisdiction of the court in Tennessee.

To the same effect as to knowledge on the part of the non-resident of suit pending in another State see *Harris* v. *Balk, Supra; Bank of Jasper* v. *First National Bank,* 258 U. S. 112, 66 L. Ed. 490.

The *Bank of Jasper* case is practically identical with petitioners' theory that the Chancery Court of Knox County did not acquire jurisdiction of a *res.* The First National Bank of Rome, Georgia, an indorsee of five certificates of deposit given by the Bank of Jasper, Florida, brought suit in the District Court of the Southern District of Florida on such certificates and the Bank plead in bar seven decrees in suits brought in Florida against the defendant by various persons claiming to have been defrauded in a stock transaction. Florida residents purchased stock in a Georgia insurance company, gave notes therefor, and the notes were discounted by the Bank of Jasper, which issued certificates of deposit in lieu thereof, the certificates becoming the property of the First National Bank of Rome. The Rome bank had actually made a special appearance in the State Courts to quash summons issued against it and it was held by this court that it was a special appearance and in Florida such special appearance did not give the State Court jurisdiction.

This Court then held that the certificates of deposit of the Bank of Jasper were equivalent to promissory notes and did not constitute a *res* within the State of Florida, so as to give the State Courts jurisdiction to determine the liability

of the maker of the certificate of deposits to the holder where neither such certificates nor the holder thereof were within the State.

It is submitted that the holding of the Court in the above case entitles the Petitioners to have their rights determined by this Court, the Opinion of the Supreme Court of Tennessee being flatly contradictory of the *Bank of Jasper* case.

See *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517, where this Court held that there must be actual service within the State of notice upon a non-resident defendant or upon someone authorized to accept service for him; and *McDonald* v. *Mabee*, 243 U. S. 90, 61 L. Ed. 608, where it was held that a personal judgment entered against a non-resident, who had neither been served with process nor appeared in suit was void. Knowledge of a non-resident of a suit brought against him in another State permits him to ignore suit and defend its validity when sued in his own State.

> See *Baldwin* v. *Iowa State, &c. Assoc.*, 383 U. S. 522, 75 L. Ed. 1245, 1246.

This Court in *New York Life Insurance Company* v. *Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140, held that the Insurance Company, although properly served by writ of garnishment under execution, to answer what it owed a resident of California claiming rights under an insurance policy, had no right to file an interpleader for the purpose of bringing about a final and conclusive adjudication of the rights of the non-resident under the policy, and personal service of process could not be had on her. In other words, the Insurance Company could not interplead and deposit the moneys it owed to the non-resident or another, a resident of Pennsylvania, and by such practice force the non-resident to litigate her rights under the policy with the Pennsylvania

claimant; and any orders and judgments entered in the Pennsylvania suit were not binding upon the non-resident.

Applying this case to the instant suit, the Robinsons, not being served with writ of garnishment, could not voluntarily come into court, and, by interpleader, force Petitioners to appear and litigate with Joe Sherman over the money deposited by the Robinsons with their interpleader. Furthermore, the Robinsons, by simple answer, could have shown that they had executed a negotiable note in Ohio, and that this fact entitled them to a discharge under their answer, their answer being conclusive as to any sum over $1000.00.

See *Finch* v. *Great American Insurance Company,* 38 L. R. A. 1068;
Vertrees v. *Hicks,* 63 Tenn. (4 Baxter) 380;
Groveland Banking Company v. *Bank,* 144 Tenn. 542;
Mayor, &c., v. *Potomac Insurance Co.,* 61 Tenn. (2 Baxter) 303;
Sentinel Fire Ins. Co., v. *Nall,* 166 Tenn. 647.

In the *Dunlevy* case the last paragraph says:

> "The established general rule is that any personal judgment which a State court has rendered against one who did not voluntarily submit to its jurisdiction and who is not a citizen of the State or served with process within its borders, no matter what the mode of service, is void because the court had no jurisdiction over his person. Pennoyer v. Neff, supra; Freeman on Judgments, (2d Ed.) Sec. 120(a); Black on Judgments (2d Ed.) Sections 904, 905."

Tennessee cases holding that our Courts have no jurisdiction over a non-resident by publication, when attempting to act *in personam* are:

Edwards v. *N. Y. Life Ins. Co.,* 173 Tenn., 102;
Purnell v. *Morton Livestock Co.,* 156 Tenn., 383;
Commerce Union Bank v. *Sharber,* 20 Tenn. App. 451.

See *Thompson* v. *Tanner*, 87 Fed. 980, that, to acquire isdiction of a non-resident, there must be seizure of operty within the immediate jurisdiction of the Court. See *Seligman* v. *Mills*, 25 Fed. (2) 807, where it was held at the mere presence of notes in New York, sent there collection, did not authorize the New York court to ze the same and thus obtain jurisdiction of the non-resi- nt owner.

Sanders v. *Armour Fertilizer Works*, 292 U. S. 190, 78 Ed. 1206, is a case arising under the Act of Congress rmitting an Insurance Company to file an interpleader ere two are claiming the proceeds of a policy of insur- ce. Before filing this interpleader, the Armour Ferti- er Works had sued Sanders, in Illinois, making the In- rance Company, a defendant by garnishment, and this urt held that the Illinois suit gave Armour a lien; and t the filing of the interpleader in the District Court in xas did not deprive Armour of rights secured by its achment suit, in which publication of the Texas resident l been made. The vital point in this case, so far as Peti- ners are concerned, is that the depositing of the money h the interpleader did not destroy the lien obtained der the attachment suit in Illinois. Further, the opinion nted out that an interpleader must be entirely disinter- ed, must aver that he has no interest in the subject mat- of the suit, must admit title in the claimants and that is indifferent between them, "and he cannot seek relief the premises against either of them," citing *Killian* v. *Ebinghaus*, 110 U. S. 568, 571, 28 L. Ed. 246, 247.

The Robinsons did not show indifference between the imants, and actually sought a cancellation of the Ohio gment, and satisfaction of the Tennessee judgment, plus render of their note.

See *Pulitzer Publishing Co.* v. *Current News,* 94 Fed. (2) 682, where a Missouri resident sued a non-resident of Missouri in a State Court, making the Publishing Company a party by garnishment. The Publishing Company answered as such and admitted it owed the non-resident, Current News, and deposited $3750.00 in court. This suit was removed to the United States District Court by the non-resident, and the District Court later quashed the suit because of lack of jurisdiction of the non-resident but failed to direct the State Court to return the fund to the garnishee. The next day a new suit was begun in the State Court and writ of attachment was served upon the Clerk as garnishee; the Clerk answered that he had $3750.00 deposited with him as Clerk. This suit went to judgment without the non-resident appearing, and the money was disbursed. Current News, the non-resident, sued in the United States District Court in Missouri, to recover of the Publishing Company $4000.00 due it. The Court of Appeals for the 8th Circuit held that the money, although in the hands of the Clerk, was still the property of the garnishee, and not of the non-resident, and, therefore, there was no *res* belonging to the non-resident that would validate a garnishment proceeding against the Clerk. As result, Current News recovered from the Publishing Company.

This case is almost a parallel to the instant suit, except that there was never writ of garnishment served upon the Robinsons in the instant suit. The Supreme Court of Tennessee principally upheld the judgment in the Chancery Court, upon the theory that the judicial attachment under the second amended bill brought Petitioners before the Court. In this respect, the Supreme Court of Tennessee relies upon *Morrow* v. *Fossick* and repudiates Opinions of this Court.

For able discussions of conflict of laws in garnishment proceedings see *4 University of Chicago Law Review, p. 403* and *48 Yale Law Journal, page 690.*

Equitable jurisdiction by constructive service on a non-resident has been consistently denied in interpleader cases, where the *res* involved was a *chose in action.*

Gary v. *Northwestern Masonic Aid Assn.* 50 N. W. 27 (Ia.) 1691;
Rosenthal v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. Supp. 154 (1921);
Bullowa v. *Provident Life and Trust Co.*, 125 App. Div. 545, 109 N. Y. Supp. 1059 (1908);
Coe v. *Garvey*, 130 Ill., App. 221 (1913);
Harris v. *Bank of British North America*, 19 Ont. Pr. 51, (1900);
Washington Life Ins. Co. v. *Gooding*, 19 Tex. Civ. App., 490, 49 S. W., 123.

Payment of money into court does not confer jurisdiction over a non-resident in the exercise of *in rem* powers.

Re: *Benfield and Stevens*, 17 Ont. Pr. 339 (1897); *Cross* v. *Armstrong*, 44 Ohio State 613, 10 N. E. 160.

I. The jurisdiction of the Supreme Court of Tennessee to hear this case under a writ of error is approved in *Blanton* v. *Hall*, 49 Tenn., 423. There a defendant, never served with subpoena and who never appeared, after final decree went down, filed the record in the Supreme Court for writ of error, the writ was granted, and the judgment voided.

Gibson's Suits in Chancery, Section 1270-71, likewise, approved this procedure.

See also *Code of Tennessee, Section 9063*, et seq.

Petitioners never appearing in Chancery Court, what remedies did they have? In *Taylor* v. *Sledge*, 110 Tenn., 263, is found an answer. The defendants in that case had

sued the complainant for damages in the Circuit Court of Shelby County, Tennessee, and recovered a default judgment and later the complainant took the case to the Supreme Court by writs of error and supersedeas, claiming the writ of inquiry for damages should have gone to the jury and not executed by the Court. The Supreme Court affirmed the judgment, in *108 Tenn., 719.* Thereupon, the complainant (defendant in the damage suit) sued in the Chancery Court of Shelby County charging that the summons in the former suit was not served upon the complainant, Taylor, and thus the Circuit Court did not have jurisdiction of his person, and the judgment was absolutely void. The defendants contended that complainant was precluded to raise the point, by having filed the record for writ of error in the Supreme Court. This contention was upheld, and the Court, in considering the remedies Taylor might have had to support his contention that he was not served with process said:

> "Did the complainant, by suing out the writs of error and supersedeas in the case of Sledge, Wells & Co. against Taylor, enter his appearance in that case, and submit to the jurisdiction of the court? We hold that he did. He had the election of two remedies to correct any error committed against him. If there was error in the face of the record, he could have the judgment reversed upon writ of error from this court. If there was no jurisdiction of his person, the judgment was absolutely void, and he could have had it so decreed, and its collection enjoined, by proper proceedings in the chancery court. It was his right and his duty to choose between these two remedies. He could not have both, because a party is entitled to only one trial in court; the policy of the law being to prevent multiplicity of suits and to put an end to litigation. It is immaterial that the two remedies are not equally broad, as the defendant is not bound to adopt the one that is less effectual. A writ of error will not reach

all errors that may be committed against a defendant in such cases, because, in the absence of a bill of exceptions, they may not appear in the record. Yet he must, when he elects to pursue this remedy, take the chances of the soundness of his judgment, and abide the consequences."

Petitioners use of the writ of error in the Supreme Court of Tennessee, therefore, gave them a right to have the decree of the Chancery Court voided, and the constitutional questions required that they file the record for writ of error in the Supreme Court, which court has exclusive jurisdiction to consider constitutional questions.

It is earnestly insisted that the petition for certiorari should be granted and the two-pronged decree of the Chancery Court, giving a money judgment against Kopelove, and acting *in personam* against Schear, be voided, the Opinion of the Supreme Court of Tennessee reversed, and the cause remanded to that court for further proceedings.

Respectfully submitted,

WILBUR W. PIPER,
Attorney and Solicitor for Petitioners.